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IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
SAN FRANCISCO DISTRICT OF IMMIGRATION
AND NATURALIZATION SERVICE, et al.,
Petitioners,

vs.

HYUNG JOON KIM,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

This Brief of *Amici Curiae* is respectfully submitted by several international human rights organizations in support of Hyung Joon Kim ("Respondent"), who argues that he may not be detained without charge and with no opportunity to challenge the reasonableness of his detention.[1] *Amici* recognize that all individuals, including aliens, are entitled to the protection of their fundamental rights. Such rights include the prohibition against arbitrary detention and the concomitant right of judicial review to challenge the lawfulness and justness of detention.

SUMMARY OF ARGUMENT

International law places strict limits on the power of states to detain individuals. Detention cannot be arbitrary and must serve a legitimate purpose. Thus, detention without charge, with no right to bail, and where the detainee poses no flight risk or danger to the public violates international law.

Under 8 U.S.C. § 1226(c), Respondent is not provided with any opportunity to challenge the reasonableness of his detention.[2] He is provided no opportunity to make bail.

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[1] *Amici* state that no party or its counsel has authored this Brief in whole or in part nor has any person or entity other than *Amici* and their counsel made any monetary contribution to its preparation. Both parties have consented to the filing of this Brief. Letters of consent have been lodged with the Clerk of the Court.

[2] *Amici* acknowledge that the United States may deport certain aliens or detain them temporarily when they pose a flight risk or danger to the public. In this case, however, *Amici* argue that the United States may not detain an alien without charge, with no right to bail, and where the detainee poses no flight risk or danger to the public.

Moreover, the Government cannot support his detention based on legitimate immigration purposes. He is not serving a criminal sentence nor has he been charged with a crime. There is no reason to believe that the Respondent poses a risk of flight or danger to the public. Accordingly, Respondent's detention falls within the international prohibition against arbitrary detention.

International law is an integral part of United States law. Moreover, it is a well-known canon of statutory construction that federal law must not be interpreted to violate international law if any other construction is fairly possible. In the present case, 8 U.S.C. § 1226(c) can readily be interpreted in a manner consistent with international law. In addition, the United States has always accorded "a decent respect to the opinions of mankind." As this Court examines the permissibility of the mandatory detention scheme set forth in 8 U.S.C. § 1226(c), it should also inform its analysis by reference to international and foreign law.

ARGUMENT

I.
ARBITRARY DETENTION VIOLATES INTERNATIONAL LAW

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge. This fundamental principle of human rights can be traced to the seminal document on personal liberty and civil governance – the Magna Carta. The Magna Carta was drafted in 1215 to check the abuse of power manifested by the English monarchy. In particular, Chapter 39 proclaimed that "[n]o free man shall be taken, imprisoned,

disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[3] *See generally* R.H. Helmholz, "Magna Carta and the Ius Commune," 66 *University of Chicago Law Review* 297 (1999).

Since its affirmation in the Magna Carta, the prohibition against arbitrary detention has become a recognized component of the due process of law. It is an integral part of the constitutional protections recognized in the Due Process Clause of the Fifth Amendment. It has been affirmed in national constitutions throughout the world. Equally significant, it has also been recognized by virtually every multilateral and regional human rights instrument.

A. The International Covenant on Civil and Political Rights Prohibits Arbitrary Detention

The International Covenant on Civil and Political Rights ("ICCPR"), which was ratified by the United States in 1992, formally codifies the prohibition against arbitrary detention and the concomitant requirement of judicial review.[4]

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[3] As noted by Blackstone in his *Commentaries on the Laws of England*, Chapter 39 alone merited the title of the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo reprint. 1978) (1783).

[4] As of October 1, 2002, there are 148 States Parties to the ICCPR. In December 1998, President Clinton forcefully reasserted the U.S. commitment to the ICCPR by issuing Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998). According to Section 1(a) of the Executive Order, "[i]t shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. For example, Article 9(1) provides that "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." According to the *travaux préparatoires*, the term "arbitrary" meant far more than "illegal." Cases of deprivation of liberty provided for by law must not be disproportionate, unjust, or unpredictable. Thus, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993). To protect against such arbitrary deprivations of liberty, Article 9(4) provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

The Human Rights Committee, established to monitor compliance with the ICCPR, has stated that Article 9 is applicable to all deprivations of liberty. *See* Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V, at 95 (1982). Indeed, the right to initiate judicial proceedings to challenge the lawfulness of detention is so important that it must be respected even during a state of emergency. *See* Human

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freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [ICCPR] . . ."

Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

In several cases, the Human Rights Committee has found a violation of the prohibition against arbitrary detention when aliens have been detained without charge and with no opportunity to challenge the legitimacy of their detention. In *A. v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), for example, the Human Rights Committee considered whether Australia's blanket policy of detaining aliens pending the determination of their refugee status was inconsistent with the ICCPR. The Committee indicated that a blanket detention policy can be considered arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence . . . ." *Id.* at para. 9.2. The fact of illegal entry alone does not provide sufficient justification for the existence of such a policy. In short, individualized review is necessary to determine the justification for detention. Moreover, detention "should not continue beyond the period for which the State can provide appropriate justification." *Id.* at para. 9.4. In addition, judicial review of such detention is mandated by the ICCPR. In this respect, judicial review of the lawfulness of detention is not limited to a mere determination of compliance with the provisions of domestic immigration law; judicial review must also consider whether the detention is unjust. Moreover, the court must have the power to order release. Because Australia's immigration policy provided no opportunity for a determination of the lawfulness of the detention, the Committee found a violation of Article 9(4). *See also Hammel v. Madagascar*, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987).

The Human Rights Committee has also recognized that bail should generally be granted in cases of pre-trial detention. In this respect, Article 9(3) of the ICCPR provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . . ." In *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), the Human Rights Committee considered the claim of two British citizens who raised an Article 9(3) violation when Spanish officials refused to grant them release on bail prior to trial. As a preliminary matter, the Committee reaffirmed "its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party." *Id.* at para 12.3. Morever, the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. *Id.* In this case, Spain had argued that there was a well-founded concern that the British citizens would leave Spanish territory if released on bail. However, Spain had provided no information justifying this concern and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. "The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9, paragraph 3 of the Covenant." *Id.* Accordingly, the Committee found a violation of Article 9(3). *See also Van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

In sum, the ICCPR, a treaty signed and ratified by the United States places strict limits on the power of states to detain aliens. First, judicial review must exist to allow

challenges to the legitimacy of any detention scheme. Second, detention must serve a legitimate purpose. Thus, detention without charge, with no right to bail, and where the detainee poses no flight risk or public danger violates the ICCPR. Significantly, the United States ratified the ICCPR without adopting any reservations, understandings, or declarations limiting the scope of these obligations.

B. Customary International Law Prohibits Arbitrary Detention

The prohibition against arbitrary detention is well-recognized in customary international law.[5] The relevant

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[5] Each branch of the United States Government has recognized the prohibition against arbitrary detention. *See, e.g.*, Executive Branch: U.S. Department of State, II *Country Reports on Human Rights Practices for 1998*, at 1984 (1999) (recognizing arbitrary detention as a human rights abuse); Legislative Branch: 22 U.S.C. § 2151n(a) (No assistance may be given to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges."); 7 U.S.C. § 1733, 22 U.S.C. § 262d, 22 U.S.C. § 2304; Judicial Branch: *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *6 (2002) (arbitrary detention constitutes a "fully recognized violation [] of international law because [it is] inconsistent with the 'inherent dignity and [] the equal and inalienable rights of all members of the human family.'"); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1992) ("there is a clear international prohibition against arbitrary arrest and detention"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Ca. 1987).

The Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) also recognizes the prohibition against arbitrary detention. ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged, arbitrary detention. . . ." In turn, "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice

sources of customary international law include treaties, General Assembly resolutions, statements of relevant U.N. agencies, decisions of international and regional tribunals, and other forms of state practice. *See generally* Jordan Paust, Joan Fitzpatrick, and Jon Van Dyke, *International Law and Litigation in the U.S.* 82-99 (2000). *Cf. The Paquete Habana* 175 U.S. 677 (1900).

The Universal Declaration of Human Rights is the most well-recognized and respected elaboration of international human rights norms of the twentieth century. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The Universal Declaration of Human Rights is recognized to embody the rules of customary international law in the realm of human rights.[6] *See generally*

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or with the dignity of the human person." [citation omitted]." *Id.* at § 702 cmt. (h). Indeed, the Restatement (Third) § 702 cmt. (n) recognizes that the prohibition against arbitrary detention has attained the status of *jus cogens*, a nonderogable norm that is binding on all states.

The United States has denounced arbitrary detention before the International Court of Justice. In the *Iranian Hostages* case, the United States Government argued to the International Court of Justice that arbitrary detention of U.S. nationals by Iranian militants constituted a gross violation of international law. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (United States v. Iran) 1980 I.C.J. 3, 42.

[6] As noted by President Reagan in 1983, "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." Proclamation of Bill of Rights Day, Human Rights Day and Week, Dec. 9, 1983, U.S. Dep't of State, Selected Documents No. 22 (December 1983).

Louis Henkin et al., *Human Rights* 286 (1999). Article 9 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to the *travaux préparatoires*, the term "arbitrary" was meant to protect individuals against both illegal and unjust laws.[7] *See generally* Parvez Hassan, "The Word 'Arbitrary' As Used in the Universal Declaration of Human Rights: 'Illegal' Or 'Unjust?,'" 10 *Harvard International Law Journal* 225 (1969). Therefore, even an arrest or detention implemented pursuant to an existing but unjust law could be categorized as "arbitrary."[8]

Several U.N. organizations have affirmed the prohibition against arbitrary detention.[9] For example, the United Nations

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[7] As noted by the delegate from the United Kingdom, the article would lose greatly if the word "arbitrary" was deleted. "There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." 3 GAOR, Pt. I, Third Comm. 247, 248 (1948).

[8] In 1964, the United Nations prepared a study on the right to be free from arbitrary arrest, detention, and exile. The study affirmed that the term "arbitrary" was not synonymous with "illegal" and that "the former signifies more than the latter." United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of the person." *Id.*

[9] See also Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988) ("Principle 2: Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose." Principle 11: A person shall not be kept in detention without being given an effective opportunity

established the Working Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards. *See* U.N. Commission on Human Rights Res. 1991/42 (1991). The Working Group has established the following three categories for considering cases of arbitrary detention:

> (A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);
> (B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, .8, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II)
> (C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. (Category III).

See Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

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to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or be assisted by counsel as prescribed by law.").

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has recognized the essential nature of judicial review and its status under international law. *See* Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002). The Special Rapporteur has made such findings in the context of immigration proceedings. According to the Special Rapporteur, "[j]udicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law." *Id.* at para. 15. Canvassing various sources of international law, including U.N. instruments and the work of regional bodies, the Special Rapporteur concluded that judicial review applies to all forms of deprivation of liberty, including administrative detention and immigration control measures. *Id.* at para. 17.

In addition to U.N. practice, each of the regional human rights systems recognize the prohibition against arbitrary detention and its concomitant requirement of judicial review. *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (Art. 7(3): "No one shall be subject to arbitrary arrest or imprisonment." Article 7(5): "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released with prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." Article 7(6): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if

the arrest or detention is unlawful.");[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (Art. 5(1): "Everyone has the right to liberty and security of the person." Article 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.");[11] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (Art. 6: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Art. 7(1): "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating

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[10] As of October 1, 2002, there are 25 States Parties to the American Convention on Human Rights. The United States has signed the American Convention.

In addition, the American Declaration of the Rights and Duties of Man, which expresses the obligations of the United States as a member of the Organization of American States, also recognizes the prohibition against arbitrary detention. American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6 (Article XXV: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.").

[11] As of October 1, 2002, there are 44 States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; . . . .").[12]

The European Court of Human Rights, which is authorized to review compliance with the European Convention on Human Rights, has found that detaining aliens without charge under a mandatory detention scheme and with no opportunity to challenge the legitimacy of detention violates the prohibition against arbitrary detention. In *Al-Nashif v. Bulgaria*, Application No. 50963/99 (June 20, 2002), the European Court considered whether Bulgaria's mandatory detention of aliens in cases of national security constituted arbitrary detention under Article 5(4) of the European Convention. Under Bulgaria's immigration law, judicial review was unavailable to such detainees. As a preliminary matter, the Court noted that "everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement." *Id.* at para. 92. Judicial review is necessary for "both the protection of the physical liberty of individuals as well as their personal liberty." *Id.* Thus, individuals "should have access to a court and the opportunity to be heard either in person or through some form of representation." *Id.* Significantly, the Court indicated that national authorities cannot simply dismiss the right of judicial review. The Court thus found that the Bulgarian mandatory detention scheme was inconsistent with the prohibitions against arbitrary detention set forth in European Convention.

The European Court has also recognized that bail should generally be granted in cases of pre-trial detention. In these cases, the Court has applied Article 5(3) of the European

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[12] As of October 1, 2002, there are 52 States Parties to the African Charter on Human and Peoples' Rights.

Convention, which provides that "[e]veryone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." In *Caballero v. United Kingdom*, Application No. 32819/96 (Feb. 8, 2000), the applicant was detained without bail pending trial pursuant to the Criminal Justice and Public Order Act, which provided for automatic denial of bail. In its own submissions to the Court, the United Kingdom acknowledged that the automatic denial of bail constituted a violation of Article 5(3). The Court agreed, finding a violation of the European Convention. *Id.* at para 21.

The Inter-American Commission on Human Rights, which is authorized to monitor compliance with the American Convention on Human Rights, has recognized the impermissibility of mandatory detention schemes and that bail should generally be granted in cases of pre-trial detention. In *Gimenez v. Argentina*, Case 11.245, Report No. 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33 (1996), the Inter-American Commission considered whether the applicant's pre-trial detention without bail constituted a violation of Article 7(5) of the American Convention. While states may impose restrictions on pre-trial release, the Commission indicated that preventive detention is an exceptional measure and should only be applied "in cases where there exist a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence." *Id.* at para. 84. The Commission indicated that determinations for pre-trial release must consider the following factors: (1) danger of flight, seriousness of the crime, and the potential severity of the sentence; (2) risk of repetition of offenses; and (3)

personal circumstances. Reviewing each factor, the Commission concluded that Argentina had failed to establish that pre-trial detention was necessary. Accordingly, the Commission found a violation of Article 7(5) of the American Convention.

In the present case, the Respondent is provided with no opportunity to challenge the reasonableness of his detention. The denial of bail is automatic. In addition, Respondent's detention serves no legitimate purpose. He is not serving a criminal sentence nor has he been charged with a crime for which he is being detained. Moreover, there is no reason to believe that the Respondent poses a risk of flight or danger to the public. Accordingly, Respondent's detention falls within the prohibition against arbitrary detention. It is "incompatible with the principles of justice or with the dignity of the human person." *Restatement (Third) of the Foreign Relations Law of the United States* § 702 cmt (h) (1987) ("*Restatement (Third)*").

II.
FEDERAL LAW MUST BE INTERPRETED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW WHEN POSSIBLE

It is a well-known doctrine of statutory construction that federal law must not be interpreted in such a manner as to violate international law if any other construction is fairly possible. According to the authoritative *Restatement (Third)* § 114, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with

an international agreement of the United States.[13] Applying this rule to cases where there is a conflict between international law and domestic practice, the *Restatement (Third)* § 115(1)(a) indicates that "[a]n Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled." Recognizing the important status of international law in the United States, federal courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes.[14] *See also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2d ed. 1996). This process does not require courts to use international law as a means of overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. Writing for the Supreme Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law in the United States.

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[13] The phrase "where fairly possible" derives from one of the principles of interpretation designed to avoid serious doubts as to the constitutionality of a federal statute that was set forth by Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936). *Restatement (Third)*, § 114 rpt. n. 2.

[14] This doctrine is not unique to American jurisprudence. *See* Ian Brownlie, *Principles of Public International Law* 48-50 (4th ed. 1990).

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.[15]

Id. at 118. In light of these principles, Chief Justice Marshall concluded that the Act of Congress did not apply to neutral vessels.

Since its elaboration in *Murray v. Schooner Charming Betsy*, this doctrine of statutory construction has been extended to treaties. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Supreme Court considered whether immigration restrictions adopted by Congress pursuant to the Chinese Restriction Act were inconsistent with a treaty entered into between the United States and China. Writing for the Court, Justice Harlan acknowledged the importance of treaties and recognized the profound implications that arise when a country violates an international obligation.

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[15] The Supreme Court's decision in *Talbot v. Seeman*, 5 U.S. 1 (1801) represents the first elaboration of this principle of statutory construction. In *Talbot*, Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43.

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

Id. at 539. Reviewing the treaty language and subsequent federal legislation, Justice Harlan refused to override the treaty language absent explicit congressional authorization.

Throughout its case law, the Supreme Court has emphasized that it will not interpret statutory provisions to conflict with international law, particularly in the absence of clear congressional intent, if any other construction is fairly possible. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), for example, the Supreme Court considered whether Congress had sought to override the provisions of the Warsaw Convention by adopting the Par Value Modification Acts. Writing for the Court in an 8-1 ruling, Justice O'Connor indicated that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *Id.* at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Acts. "Legislative silence is not sufficient to abrogate a treaty. [citation omitted] Neither the legislative

histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention."[16] Id. Accordingly, Justice O'Connor concluded that the treaty provisions remained enforceable in United States courts.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Supreme Court considered whether provisions of the 1947 Military Bases Agreement and the 1968 Base Labor Agreement between the United States and the Philippines were superceded by a 1971 federal statute on employment discrimination. Writing for a unanimous Court, then-Justice Rehnquist reaffirmed the maxim of statutory construction established in *Murray v. Schooner Charming Betsy*. *Id.* at 32. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required ...." *Id.* Reviewing the legislative history of the federal statute, then-Justice Rehnquist found no support whatsoever for the conclusion that Congress intended in some

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[16] While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of *Murray v. Schooner Charming Betsy*. Indeed, Justice Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 263 (Stevens, J. dissenting). *See also Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

way to limit the scope of the agreements. *Id.* at 33. Accordingly, then-Justice Rehnquist concluded that the international agreements were not superseded by the subsequent federal legislation.

In the most recent elaboration of the *Charming Betsy* doctrine issued by the Supreme Court, Justice Scalia, in a dissenting opinion joined by Justices O'Connor, Kennedy, and Thomas, reaffirmed the validity of this canon of statutory construction. *See Hartford Fire Insurance Co., v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting). In determining the extraterritorial reach of the Sherman Act, Justice Scalia acknowledged the relevance of international law in statutory construction. "It is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. [citation omitted] Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe." *Id.* at 815. Significantly, Justice Scalia indicated that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*

While this doctrine of statutory construction is steeped in the principle of comity, it is also influenced by foreign policy concerns. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Supreme Court applied this doctrine to avoid negative foreign policy implications. Specifically, the Court refused to construe the National Labor Relations Act in a manner contrary to State Department regulations because such a construction would have foreign policy implications. The Court also relied on the

fact that the proposed construction would have been contrary to a "well-established rule of international law." *Id.* at 21. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

This doctrine of statutory construction is not an historical anomaly or isolated extrapolation – it is a longstanding doctrine of statutory construction that has been affirmed by the U.S. Supreme Court in numerous decisions. *See also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-449 (1924); *Brown v. United States*, 12 U.S. 110, 125 (1814).[17] The *Charming Betsy* doctrine is based upon comity, a respect for other nations, and the law that binds the international community. As noted by Justice O'Connor, "[o]ur membership in the family of civilized nations demands no less than this reciprocal recognition of rights and responsibilities . . . ." Sandra Day O'Connor, "Federalism of Free Nations," 28 *New York University Journal of International Law and Politics* 35, 39 (1995-96). The *Charming Betsy* doctrine is also based upon the recognition that violations of international law, unlike violations of

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[17] Lower courts have also applied this canon of statutory construction on countless occasions. *See, e.g., United States v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1464 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.").

domestic law, can have profound foreign policy consequences. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect issues of international law.

In the present case, the statute under which Respondent was being held, 8 U.S.C. § 1226(c), contains no clear statement purporting to violate the international norm against arbitrary detention. Moreover, the statute can be interpreted in a manner that does not violate international law. For example, 8 U.S.C. § 1226(c) can be interpreted as not applying to lawful permanent residents unless a final administrative removal order has been issued. This interpretation would not subject Respondent to arbitrary detention in violation of international law.[18]

This approach is consistent with international law. From U.S. ratification of the ICCPR to the adoption of Executive Order, No. 13107, the United States is fully committed to the protection and promotion of human rights and fundamental freedoms, including the prohibition against arbitrary detention. In the absence of a government act that clearly and unequivocally states an intention to supersede the prohibition against arbitrary detention, this Court should interpret 8 U.S.C. § 1226(c) in a manner consistent with United States obligations under international law.

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[18] Even if another construction of 8 U.S.C. § 1226(c) could be found to violate international law, such construction is not presented in this case. *See Jones v. United States*, 529 U.S. 848, 860 (2000) (Thomas, J., concurring).

III.
U.S. COURTS SHOULD INFORM THEIR ANALYSIS BY REFERENCE TO INTERNATIONAL AND FOREIGN PRACTICE

The United States has a long tradition of providing "a decent respect to the opinions of mankind." *The Declaration of Independence* para. 1 (U.S. 1776). This practice is not designed to override domestic law; rather, it seeks to inform the interpretation and understanding of our core values, such as due process and fundamental fairness.

Indeed, this tradition can be traced to the earliest days of our nation's history. Both the Declaration of Independence and the United States Constitution were influenced by numerous sources of law, both foreign and international. The Declaration of Independence, for example, refers to providing "a decent respect to the opinions of mankind." And it was only through such comparative analysis that the drafters of these documents were able to distill such concepts as "unalienable Rights." *See* Louis Henkin, *The Age of Rights* (1990). *The Federalist Papers* are also replete with references to both foreign practice and the law of nations. *See, e.g., The Federalist No. 78*, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Many Supreme Court rulings have engaged in such comparative methodology.[19] In *Atkins v. Virginia*, 122 S.Ct.

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[19] The U.S. Department of State has also recognized the relevance of international law for purposes of judicial inquiry. Indeed, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives, thereof, as well as to the stated policy reasons for ratification." Committee against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the

2242 (2002), for example, the Supreme Court referenced, albeit briefly, international practice. In determining whether the execution of mentally retarded defendants violated the Eighth Amendment, the Court noted the overwhelming disapproval of the world community in the imposition of the death penalty for crimes committed by mentally retarded offenders. *Id.* at 2249. The Court added that such evidence was not dispositive in its interpretation of the Eighth Amendment. It noted, however, that the consistency of these views with the legislative evidence "lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id. See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Breyer, J., concurring) (referencing the practice of constitutional courts in other countries); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting) (referencing the practice of foreign courts and international institutions); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (referencing the practice of Western democracies); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring) (referencing international agreements); *Miranda v. Arizona*, 384 U.S. 436 (1966) (referencing the practice of common law countries).

Several members of this Court have acknowledged the relevance and benefits of such comparative methodology.[20] Justice O'Connor, for example, has remarked that "American judges and lawyers can benefit from broadening our horizons

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Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 57.

[20] In his seminal work *The Common Law*, Justice Holmes referenced numerous foreign sources in his efforts to explain the nature of American jurisprudence. *See* Oliver Wendell Holmes, Jr., *The Common Law* 2, 7 (1886). For a similar approach, *see* H.L.A. Hart, *The Concept of Law* 246-47 (1961).

. . . and looking beyond American borders in our search for persuasive legal reasoning." Sandra Day O'Connor, "Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law," *International Judicial Observer* (June 1997), at 2. There is, in fact, ample precedent for such practice. Moreover, Justice O'Connor recognized the critical function of comparative methodology in maintaining the salience of our legal system. "The vibrancy of our American-Anglo legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world." *Id.* at 3. Thus, Justice O'Connor remarked that "[w]e should keep our eyes open for innovations in foreign jurisdictions that, with some grafting and pruning, might be transplanted to our own legal system."[21] *Id.* Chief Justice Rehnquist has noted that it is appropriate for United States courts to "begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, "Constitutional Courts - Comparative Remarks," *in Germany and its Basic Law: Past, Present and Future* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993). Justice Ginsburg has echoed these views in her own writings.

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[21] Justice O'Connor has recognized the benefits of considering both foreign and international law. *See* O'Connor, "Federalism of Free Nations," at 41 ("Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments. . . . As our domestic courts are increasingly asked to resolve disputes that involve questions of foreign and international law about which we have no special competence, I think there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals – just as we have offered these courts some helpful approaches from our own legal traditions.")

> [C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

Ruth Bader Ginsburg and Deborah Jones Merritt, "Affirmative Action: An International Human Rights Dialogue," 21 *Cardozo Law Review* 253, 282 (1999).

In sum, the United States has a long tradition of reviewing international and foreign practice. *See generally* Harold Hongju Koh, "Edward L. Barrett Jr. Lecture on Constitutional Law: Paying 'Decent Respect' to World Opinion on the Death Penalty," 35 *University of California Davis Law Review* 1085 (2002); Vicki C. Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experience," 51 *Duke Law Journal* 223 (2001); Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 *Yale Law Journal* 1225 (1999); Louis Henkin, "A Decent Respect to the Opinions of Mankind," 25 *John Marshall Law Review* 215 (1992). As this Court examines the permissibility of the mandatory detention scheme set forth in 8 U.S.C. § 1226(c), it should inform its analysis by reference to international and

foreign practice.[22] Such practice is uniform in its prohibition against arbitrary detention.

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[22] Because the Supreme Court derives its notions of sovereign authority over aliens from international law, it is also worth considering international law to identify limitations on sovereign authority. *Cf.* Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Columbia Law Review* 961, 1046 (2000).

CONCLUSION

The prohibition against arbitrary detention is a core constitutional value that is recognized and affirmed under international law. The Ninth Circuit's decision affirms this core value. For these reasons, *Amici* respectfully submit this Brief and urge the Court to affirm the Ninth Circuit's ruling.

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